

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

REYNAUD CHANDLER,

Petitioner,

v.

9: 06-CV-1024
(TJM)(GJD)

STATE OF NEW YORK,

Respondent.

APPEARANCES:

OF COUNSEL:

REYNAUD CHANDLER
69775-053
Petitioner, *pro se*

THOMAS J. MCAVOY, Senior United States District Judge

DECISION AND ORDER

Petitioner Reynaud Chandler filed a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254 on August 21, 2006. Dkt. No. 1. Petitioner thereafter filed an Amended Petition. Dkt. No. 5. The Amended Petition was denied and dismissed by Order of this Court filed on April 19, 2007. Dkt. No. 6. Judgment was entered in favor of Respondent on April 19, 2007. Dkt. No. 7. Presently before the Court is a Motion for a Certificate of Appealability ("COA") filed by Petitioner. Dkt. No. 8.

I. Notice of Appeal

As an initial matter, the Court notes that Petitioner has not filed a Notice of Appeal in this proceeding. However, the Second Circuit has held that a Motion for a Certificate of Appealability ("COA") may be construed as a Notice of Appeal. *See Marmolejo v. United States*, 196 F.3d 377, 378 (2d Cir. 1999). "As long as the pro se party's notice of appeal evinces an intent to appeal an order or judgment of the district court and appellee has not

been prejudiced or misled by the notice, the notice's technical deficiencies will not bar appellate jurisdiction." *Marmolejo*, 196 F.3d at 378 (citing *Grune v. Coughlin*, 913 F.2d 41, 43 (2d Cir.1990)). In this proceeding, Petitioner's intent to appeal from the Order and Judgment dismissing this action is evident from his Motion for a Certificate of Appealability. See Dkt. No. 8. The Motion for a COA further contains all of the information required for a Notice of Appeal under Rule 3(c) of the Federal Rules of Appellate Procedure.¹ Accordingly, Petitioner's Motion for a Certificate of Appealability should be construed as a Notice of Appeal. The Clerk is directed to docket a copy of the COA as Petitioner's Notice of Appeal. Such Notice of Appeal shall be deemed filed, *nunc pro tunc*, on May 7, 2007 – the same date that the COA was filed.

II. Motion for Certificate of Appealability

Section 2253(c)(1) of Title 28 of the United States Code provides, in pertinent part, that

[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –
 (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
 (B) the final order in a proceeding under section 2255.

28 U.S.C. § 2253(c)(1).²

¹ Since the Petition was never served upon Respondent, there is no appellee, and therefore no prejudice.

² Likewise, Rule 22 of the Federal Rules of Appellate Procedure provides, in pertinent part, that "[i]n a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a

Furthermore, the Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

After reviewing the relevant portions of the file, and for the reasons set forth in this Court's April 19, 2007 Order, the Court finds that Petitioner has failed to make the required showing. Therefore, the Court denies his request for a COA.

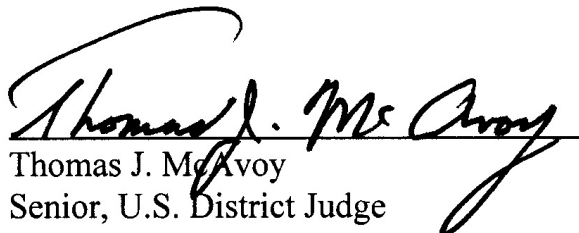
WHEREFORE, it is hereby

ORDERED, that the Clerk docket a copy of Petitioner's Motion for a Certificate of Appealability (Dkt. No. 8) as Petitioner's Notice of Appeal. Such Notice of Appeal shall be filed, *nunc pro tunc*, on May 7, 2007, and it is further

ORDERED, that Petitioner's Motion for a Certificate of Appealability (Dkt. No. 8) is **DENIED**, and it is further

ORDERED, that the Clerk of the Court serve a copy of this Order on Petitioner in accordance with the local rules.

Dated: May 15, 2007


Thomas J. McAvoy
Senior, U.S. District Judge

certificate of appealability under 28 U.S.C. § 2253(c)." Fed. R. App. P. 22(b)(1).